92-550

Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

HOWARD E. SAARI,
*Petitioner,*
*vs.*
SMITH BARNEY, HARRIS UPHAM & CO., INC.,
*Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does section 5(d) of the Federal Employee Polygraph Protection Act (29 U.S.C. § 2005(d)), which prohibits the contractual waiver of rights and procedures under the Act, preclude the compulsory arbitration of the wrongful discharge claim of an employee of a stock brokerage house who was terminated because of his refusal to take a polygraph examination in the context of an investigation of the theft of money from another employee's desk, where the terminated employee had, as a condition of employment, signed the standard Uniform Application for Securities Industry Registration (U-4 Form) which contains an agreement to arbitrate disputes with his firm?

2. Does the prohibition of the federal preemption of state polygraph protection laws stated in section 9 of the Federal Employee Polygraph Protection Act (29 U.S.C. § 2009), preclude the federal court of appeals from ordering the arbitration of a claim arising from the violation of California law (California Labor Code § 432.2) which prohibits administration of polygraph tests as a condition of employment or continued employment?

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

HOWARD E. SAARI,
*Petitioner,*
*vs.*
SMITH BARNEY, HARRIS UPHAM & CO., INC.,
*Respondent.*

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# PETITION FOR WRIT OF CERTIORARI

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Petitioner, Howard E. Saari,[1] herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on June 29, 1992, which reversed an Order denying Respondent's motion to compel arbitration, filed January 5, 1990, by the United States District Court for the Central District of California.

## OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 968 F.2d 877 and is reprinted herein as Appendix A.

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[1] The parties to the proceeding in the Ninth Circuit are those in the caption.

The Memorandum of Decision of the United States District Court for the Central District of California is reprinted herein as Appendix B.

The Order of the United States District Court for the Central District of California is reprinted herein as Appendix C.

## BASIS FOR JURISDICTION

The final judgment of the Ninth Circuit Court of Appeals was filed on June 29, 1992. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant portions of the following statutes and regulatory provisions are reprinted herein as Appendix D:

1. Federal Employee Polygraph Protection Act, 29 U.S.C. § 2001 *et seq.* (App. D-1);

2. Federal Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (App. D-4);

3. California Labor Code § 432.2 (App. D-5); and

4. New York Stock Exchange Rule 347 (App. D-6).

## STATEMENT OF THE CASE

Petitioner, Howard E. Saari ("Saari"), was employed as an account executive with respondent, Smith Barney, Harris Upham & Co., Inc. ("Smith Barney"). As a condition of employment, Saari was required to sign a

Uniform Application for Securities Industry Registration ("U-4 form") which provides as follows:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . . .

Saari was registered with the New York Stock Exchange, Rule 347 of which provides as follows:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment as such registered representative by and with such member or member organization shall be settled by arbitration. . . .

On or about December 14, 1988, money was allegedly stolen from the desk of another Smith Barney employee. When questioned, Saari denied any involvement in the supposed theft.

On or about February 13, 1989, Smith Barney's office manager asked Saari to take a polygraph examination. Saari refused. Saari was immediately fired by Smith Barney because of his refusal to take a polygraph examination.

Despite the fact that Saari's employment contract contained an agreement to arbitrate claims, the Federal Employee Polygraph Protection Act of 1988 (29 U.S.C. 2001 *et seq.*) ("EPPA") provides for a civil remedy which, by express provision, may not be waived. (29 U.S.C. § 2005).

Saari's complaint, filed in March, 1989, in the United States District Court, Central District of California, alleged that Saari's discharge violated the EPPA, California Labor Code § 432.2, and public policy, and that Smith Barney and its agents had published statements arising out of the incident which had slandered Saari.

The District Court, the Honorable Mariana R. Pfaelzer presiding, denied Smith Barney's motion to compel arbitration as to the EPPA and California Polygraph law claims, and set a further hearing on the arbitrability of the slander claim. Following further oral argument, the District Court entered an order denying the motion to compel arbitration as to all causes of action in the complaint. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 2005(c)(2).

The Ninth Circuit Court of Appeals reversed the District Court's order and held that all of Saari's claims were subject to arbitration. The Ninth Circuit had jurisdiction pursuant to either subparagraphs (a) or (c) of 29 U.S.C. § 16(A)(1).

It is from this Order that this Petition for Writ of Certiorari is taken.

## REASONS FOR GRANTING THE WRIT

### I.

### THE ISSUE OF WHETHER CLAIMS UNDER THE EPPA CAN BE COMPELLED INTO ARBITRATION IS AN IMPORTANT QUESTION OF LAW WHICH IS A CASE OF FIRST IMPRESSION

This case presents the important question of whether Saari's claim for violation of the EPPA, which provides for a civil remedy, must be compelled into arbitration if his employment agreement contains an arbitration clause. The very purpose of the EPPA is to protect employees and potential employees from being coerced into taking lie detector tests as a condition of attaining or retaining employment. The Congress went to extraordinary lengths to provide rights under the EPPA and to provide a mechanism by which employees may assert those rights. Thus, if an employee can be compelled to forego the judicial procedure explicitly provided in the EPPA, and be compelled to arbitrate a claim based upon an employer's violation of the EPPA's prohibitions, then the EPPA's protections become severely compromised, because the judicial enforcement scheme provided by the Congress is an integral element of the Act's protections.

In enacting the EPPA, Congress was aware of the growing use of inherently unreliable polygraph testing as a dangerous screening device. Congress was concerned with the negative implications polygraph testing would have on today's job market, where too many qualified workers are seeking too few potential jobs. Additionally, uncontrolled use of polygraph examinations tilts the economic scale in favor of employers. Congress was

especially wary of employer efforts to circumvent the protections provided for employees in the EPPA. One method, in particular, which Congress was concerned about was the practice of "volunteer" submission. *See* H.R. Rep. No. 208, 100th Cong. at p.4. The U-4 agreement, which securities industry employees routinely sign as a condition of employment, *requires* the "voluntary" submission which Congress intended to prohibit.

### A. The Ninth Circuit Court of Appeals did not properly resolve this issue because the case it relied upon as its primary authority involved a claim arising under the Federal Age Discrimination in Employment Act and not the EPPA

The Ninth Circuit Court of Appeals held that all of Saari's claims were subject to arbitration. In support of its holding, the Ninth Circuit primarily relied upon this Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*, __ U.S. __, 111 S. Ct. 1647, 114 L.Ed.2d 26 (1991). Such reliance is improper, because, while the petitioner's claim in *Gilmer* arose under the Federal Age Discrimination in Employment Act ("ADEA"), Saari's claim is based upon the EPPA. The *Gilmer* case, therefore, does not help decide this issue.

This Court's rationale in *Gilmer* is quite specific to the ADEA and, thus, neither the decision in that case nor the *ratio decidendi* is dispositive of the question of the arbitrability of claims under the EPPA. *Gilmer* simply does not speak to the issue of whether a claim for violation of the EPPA may be compelled into arbitration and, therefore, that question remains one of first impression.

Obviously, each individual Congressional Act is a highly complex piece of legislation having a separate and distinct congressional intent. Because Saari's claim is based upon a violation of the EPPA, the Ninth Circuit improperly relied upon *Gilmer*, a case involving a claim under the ADEA, as its primary authority for holding that a claim under the EPPA is also subject to arbitration.

In *Gilmer*, this Court acknowledged that not all statutory claims are appropriate for arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 114 L.Ed.2d at 37 (1991). For example, this Court stated that a party is not bound to an agreement to arbitrate if Congress has ". . . evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* Citing, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

The statutory language of the EPPA expressly embodies Congress' intent to preclude a waiver of judicial remedies. 29 U.S.C. § 2005(d) states as follows:

> Waiver of rights prohibited. **The rights and procedures provided by this Act may not be waived by contract** or otherwise, unless such waiver is part of a written settlement agreed to and signed by the parties to the pending action or complaint under this Act. (emphasis added).

The underscored language clearly demonstrates that Congress intended that the rights and procedures provided by the EPPA cannot be waived by contract. Therefore, because these rights and procedures cannot be waived, the arbitration provision of the employment agreement is without force with respect to Saari's EPPA

claim, and Saari should be able to pursue his civil remedies provided by the EPPA.

### B. The Ninth Circuit Court of Appeals did not properly resolve this issue because the case it relied upon as its sole authority involved a claim arising under the ADEA, a statute which does not preclude a waiver of judicial remedies, while Saari's claim arose under the EPPA, a statute which does preclude a waiver of judicial remedies

As explained, in holding that Saari's claim under the EPPA was subject to arbitration, the Ninth Circuit Court of Appeals primarily relied upon this Court's opinion in *Gilmer*. Such reliance was improper because, while the petitioner in *Gilmer* conceded that nothing in the text of the ADEA or its legislative history explicitly precludes arbitration (111 S. Ct. at 1652), Saari's claim to a judicial remedy relies upon the express prohibition of waiver of rights provision contained in the EPPA (29 U.S.C. § 2005(d)). It follows, that the Ninth Circuit Court of Appeals improperly relied upon *Gilmer* in deciding that a claim under the EPPA is subject to arbitration, because that case involved a claim under the ADEA, a statute which does *not* prohibit the waiver of judicial remedies. Therefore, the Ninth Circuit Court of Appeals did not properly resolve the issue of whether a claim under the EPPA, a statute which *does* contain an express prohibition of waiver of rights and procedures clause, may be compelled into arbitration.

The answer to that question lies in this Court's explanation in *Gilmer* of how to determine when Congress intended to "preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer*, __ U.S. __, 114 L.Ed.2d at 37. The Court noted that "[i]f such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Id.*

The enforcement mechanism of the EPPA sets forth certain judicial remedies which can only be asserted and prosecuted by the employee who is the victim of the violation. The ADEA, by contrast, contains a mechanism for filing claims with the EEOC, and provides that the individual's ability to enforce the Act on his or her own behalf terminates if the EEOC commences action. 29 U.S.C. § 626 (c)(1). Thus, the employee's ability to enforce the rights provided is an integral part of the EPPA statute itself. If the intent of Congress was, as it clearly was, to prohibit the compelling of polygraph examinations as a condition of obtaining or keeping a job, then permitting an employer as a condition of employment to compel a potential employee to forego the judicial remedy and arbitrate a claim for violation of the Act is inherently inconsistent.

Therefore, this Writ of Certiorari should be granted because no court has directly decided the issue of whether a claim under the EPPA is subject to a prior arbitration clause.

The decision of the Ninth Circuit, founded as it is on the *Gilmer* decision, does not approach the question from the perspective of the EPPA. In the EPPA legislation, Congress went to extraordinary lengths to insure that employees are not compelled to give up their rights in order to get or keep a job. The Ninth Circuit decision,

founded as it is on the ADEA principles, rather than EPPA principles, does not reflect the Congressional intent.

## II.

## SAARI'S CLAIM UNDER THE CALIFORNIA LABOR CODE SHOULD NOT BE COMPELLED INTO ARBITRATION BECAUSE THERE IS A LIMITATION ON FEDERAL PREEMPTION IN THE EPPA

Saari's state polygraph claim is not arbitrable, because Congress, by exempting federal polygraph claims from arbitration, also intended to exempt state polygraph claims. As demonstrated above, Saari's federal EPPA claim is not arbitrable. Section 2009 of the EPPA provides that "this chapter shall not preempt any provision of any State or local law . . . that prohibits lie detector tests or is more restrictive with respect to lie detector tests than any provision of this chapter." 29 U.S.C. § 2009. The California law can only be more restrictive than the federal EPPA if its judicial enforcement remains intact. Again, the intent of the Congress was clearly stated. California Labor Code § 432.2 is more restrictive than the EPPA because it prohibits all polygraph tests by private employers. There are no exceptions.

Congress, in enacting the Federal Arbitration Act in 1925, could hardly have intended to preempt state polygraph laws. As Justice Stevens has stated in dissent:

> Even though the Arbitration Act had been on the books for almost 50 years in 1973 [when *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 94 S. Ct. 383, 38 L.Ed.2d 348 (1973) was decided], apparently

> neither the Court nor the litigants even considered the possibility that the Act had pre-empted state-created rights. It is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend. *Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520, 2527, 96 L.Ed.2d 426 (1987) (Stevens, J., dissenting).

Furthermore, California's policy choice to provide a judicial, not an arbitral forum, for its state polygraph claims is entitled to respect. 107 S. Ct. at 2528 (O'Connor, J., dissenting).

## CONCLUSION

The Ninth Circuit Court of Appeals decision also compels Saari to arbitrate his slander claim. While there is a question of whether a cause of action for slander is arbitrable, it is not an appropriate question for certiorari. However, if certiorari is granted, Petitioner would hope that the Court would permit the parties to address this issue, and that the Court would decide that question as well.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: September 25 1992.

Respectfully submitted,

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# APPENDIX A

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

Howard E. Saari,
*Plaintiff-Appellee,*

v.

Smith Barney, Harris Upham & Co., Inc.
*Defendant-Appellant.*

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No. 90-55187

D.C. No. CV-89-1870-MRP

**OPINION**

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted
February 3, 1992 — Pasadena, California

Filed June 29, 1992

Before: Melvin Brunetti, Diarmuid F. O'Scannlain
and Thomas G. Nelson, Circuit Judges.

Opinion by Judge T.G. Nelson

## OPINION

T.G. NELSON, Circuit Judge:

In the employer's appeal of a district court order refusing to order arbitration of a discharged employee's claims, we hold that the Federal Employee Polygraph Protection Act does not prohibit arbitration of claims where required by contract. We further hold that the state law claims for violation of the California Labor Code and slander are likewise subject to arbitration.

### *FACTS AND PROCEEDINGS BELOW*

Howard Saari (Saari) was employed by Smith Barney, Harris Upham & Co., Inc. (Smith Barney) as an account executive beginning in July, 1988, and alleges that at all times his work was satisfactory. According to Saari's complaint, on or about December 14, 1988, a "sum of money, supposedly belonging to a client of Smith Barney, was supposedly stolen from the desk of a Smith Barney employee." Saari alleged he was questioned about the theft and was later asked to take a polygraph test concerning the incident, which he refused. Saari claims he was then terminated for his refusal to take the polygraph examination.

Saari filed an action in federal district court, alleging (1) a violation of the Employee Polygraph Protection Act (EPPA), 29 U.S.C. §§ 2001-2009, (2) a violation of California Labor Code § 432.2, which makes it unlawful for an employer to demand or require that any employee submit to a polygraph test as a condition of continued employment, and (3) a state law claim of slander, alleging that Smith Barney or its agent had slandered him by stating that he had engaged in a theft of money, or that Saari himself had been required to publish those statements in responding to questions from prospective

employers concerning the cause of his termination from Smith Barney.

As a condition of his employment with Smith Barney, Saari signed a Uniform Application of Securities Industry Registration ("U-4 Form") which provided in relevant part:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register.

Saari became a registered representative of the New York Stock Exchange and thereby subject to its Rule 347 which provides that:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration.

After filing an answer to Saari's complaint, Smith Barney filed a motion to compel arbitration and stay proceedings pending arbitration of all three claims pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 3. The district court denied the motion, holding the underlying purposes of EPPA, as evidenced by its enforcement scheme and anti-waiver provision, demonstrate a congressional intent that access to the courts not be precluded by arbitration. The district court further held that the state polygraph protection claims were exempt from arbitration as well, because of the "important role assigned to state law in carrying out the purposes of the EPPA." The district court later denied the motion to compel arbitration as to the slander claim.

Smith Barney timely appealed entry of the district court's order. We have jurisdiction pursuant to the Federal Arbitration Act, 9 U.S.C. § 16, and reverse the orders of the district court.[1]

## *STANDARD OF REVIEW*

This court reviews the trial court's denial of a motion to compel arbitration *de novo, Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449 (9th Cir. 1986).

## I.

## *EPPA CLAIMS*

In denying arbitration to Smith Barney, the district court relied on *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221 (3d Cir. 1989). The Third Circuit there held that Congress did not intend that the right to a judicial forum under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, could be displaced by arbitration, concluding that "ADEA is one of the statutory schemes that present the 'inherent conflict [with] arbitration' referred to by the Supreme Court in *Shearson [American Express, Inc. v. McMahon*, 482 U.S. 220 (1987)]." *Id*, at 227.

**[1]** In resolving a conflict between a Fourth Circuit case and the *Nicholson* case from the Third Circuit, the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. ___, 111 S. Ct. 1647, 114 L.Ed.2d 26 (1991), held that ADEA claims were subject to

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[1] **Although we are reversing Judge Pfaelzer, our reversal is based on an intervening change in the law and not upon any error on the part of Judge Pfaelzer.**

arbitration, impliedly overruling *Nicholson*, 111 S. Ct. at 1657. The Court emphasized that the Federal Arbitration Act (FAA) manifests a "liberal federal policy favoring arbitration agreements." 111 S. Ct. at 1651 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

Similar to Saari's situation here, the plaintiff in *Gilmer* was required to register as a securities representative with the New York Stock Exchange, and was subject to N.Y.S.E. Rule 347. The Court held that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Id.* at 1652. The Court noted that " '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by that statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' " *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). The Court also noted that it had upheld arbitration agreements relating to claims arising under the Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933. *Id.* at 1652.

**[2]** The Court recognized that not all statutory claims may be appropriate for arbitration under the FAA, but " '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.' " *Id.* (quoting *Mitsubishi*, 473 U.S. at 628). The Court placed the burden on the plaintiff to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims, and noted that if such an intention exists, it would be discoverable in the text of ADEA, its legislative history, or an "inherent conflict" between arbitration and ADEA's underlying purposes. *Id.*

Saari's reliance on *Nicholson* in the court below proved to be misplaced. As a substitute, Saari argues that the Court's rationale in *Gilmer* is specific to ADEA, and is not dispositive of the ability to arbitrate claims under EPPA, Saari attempts, contrary to his arguments in the district court, to distinguish EPPA from ADEA, on the basis of the analysis set forth in *Gilmer*.

### A. *The text and Legislative History of EPPA*

[3] Saari notes the statement of the *Gilmer* Court that ADEA's flexible approach to resolution of claims and the role of the EEOC under ADEA in "informal methods of conciliation, conference, and persuasion" indicates that "out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress." *Gilmer*, 111 S. Ct. at 1654. Saari contends that the enforcement provisions of EPPA show no such flexibility.

Section 2002 of EPPA contains a broad general prohibition of employer use of lie detector tests. The prohibition is subject to exceptions listed in Sections 2006 and 2007 relating to governmental employers, national defense and security, F.B.I. contractors, certain private security firms, and a limited exemption for ongoing investigations.[2] The enforcement provisions in Section 2005 permit an assessment of a civil penalty by the Secretary of Labor in an amount not to exceed $10,000 and injunctive actions by the Secretary to restrain violations of the Act. The redress the Secretary may seek includes orders of employment, reinstatement, promotion, and payment of lost wages and benefits. The enforcement provisions also include a private civil action to be brought by the employee or prospective

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[2] *See* footnote 2 *infra*.

employee affected by such violation. *See* 29 U.S.C. § 2005(c). The available relief is identical to that available to the Secretary by injunctive action under Section 2005(b). The enforcement provisions also include a bar on the waiver of rights which provides:

> The rights and procedures provided by this chapter may not be waived by contract or otherwise, unless such waiver is part of a written settlement agreed to and signed by the parties to the pending action or complaint under this Act.

29 U.S.C. § 2005(d).

[4] Saari contends that unlike the *Gilmer* Court's finding of ADEA's flexible approach to the resolution of claims, EPPA relies on the judicial process for the resolution of claims. We think, however, that Saari's reliance on the flexibility comment by the Court in *Gilmer* is misplaced. The Court made it very clear in *Gilmer* that the fact that a particular statute embodies a judicial enforcement process does not exclude arbitration. The Supreme Court rejected Saari's argument when it was made by Gilmer:

> Gilmer also argues that compulsory arbitration is improper because it deprives claimants of the judicial forum provided for by the ADEA. Congress, however, did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA.

*Gilmer*, 111 S. Ct. at 1653-54.

The Court went on to note that arbitration is consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts because arbitration agreements, like a provision for concurrent jurisdiction, allow claimants a broader right to select a

particular forum for resolving disputes, rather than limiting them solely to a judicial forum. *Id.* at 1654. The provision of a judicial forum for resolution of disputes is not inconsistent with the provisions of the FAA providing for an enforceable right of the parties to contractually agree to resolve those same disputes in an arbitral forum.

In addition, it should be noted that EPPA is not completely inflexible in its approach to resolution of employee claims, since either the Secretary or the employee may seek judicial relief, and the Secretary's authority to seek relief on behalf of the employee is textually identical to the employee's right to seek relief directly. Furthermore, even if the violation did not result in harm compensable in money damages or job-related restitution, the Secretary is empowered to impose and collect civil penalties of up to $10,000. Thus, in the broader view of preventing abuse of polygraph testing in the employment arena, the Secretary has a broad arsenal of weapons with which to address problems. The lack of a specific commission, such as the EEOC, to which claims may be addressed in the first instance does not appear to be a compelling distinction between ADEA and EPPA.

[5] Saari also argues that the anti-waiver provision of EPPA is different than the acts referred to in *Gilmer* in that the anti-waiver provision in EPPA provides that the "rights *and procedures* provided by this chapter may not be waived by contract or otherwise . . . ." 29 U.S.C. § 2005(d) (emphasis added). Saari contends that the "and procedure" language evidenced a legislative intent that the procedures under EPPA were not to be waived. Saari argues that the procedures available under EPPA are solely judicial and therefore arbitration cannot oust him from the judicial arena.

[6] Saari's reliance on the "and procedures" language is unavailing. Saari is arguing that those words make the judicial forum provisions of EPPA exclusive of arbitration. This rationale does not stand in light of *Gilmer*. In *Gilmer*, the Court noted that the substantive rights enforced by arbitration are identical to those enforced in a judicial forum, the only difference being an agreement by the parties to submit the "resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 111 S. Ct. at 1652.

[7] The term "procedures" is too broad to relate solely to forum selection. In order for an employer to avail itself of the provisions relating to ongoing investigations in Section 2006(d),[3] it would be required to

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[3] (d) Limited exemption for ongoing investigations. Subject to sections 2007 and 2008 of this title, this chapter shall not prohibit an employer from requesting an employee to submit to a polygraph test if —

(1) the test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage;

(2) the employee had access to the property that is the subject of the investigation;

(3) the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation; and

(4) employer executes a statement, provided to the examinee before the test, that —

(A) sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees.

(B) is signed by a person (other than a polygraph examiner) authorized to legally bind the employer.

(C) is retained by the employer for at least 3 years, and

(D) contains at a minimum —

(continued)

follow certain "procedures." It is the type of procedure found in 2006(d) that an employer may attempt to have a prospective employee waive as a condition of employment, and that the anti-waiver provision would invalidate if extracted from the employee.

[8] Furthermore, the "and procedures" language in EPPA is no stronger than the anti-waiver provisions found in the Sherman Act, the Securities Exchange Act of 1934, the Securities Act of 1933, and RICO. Those acts provide either that the act's provisions may not be waived or that the district court shall have exclusive jurisdiction, which the Court noted in *Gilmer* has been held not to exclude arbitration. *Gilmer*, 111 S. Ct. at 1651-1652.

Equally unconvincing are Saari's arguments concerning the legislative history of EPPA. Rejection by Congress of an amendment to EPPA which would have exempted the banking and securities industry from the scope of EPPA does not indicate an intention to exclude arbitration as a possible forum.

### B. *Inherent Conflict*

Saari argues that requiring arbitration in his case creates an inherent conflict with EPPA's underlying

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(fn. continued)

> (i) an identification of the specific economic loss or injury to the business of the employer,
> (ii) a statement indicating that the employee had access to the property that is the subject of the investigation, and
> (iii) a statement describing the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.

29 U.S.C. § 2006(d).

purposes[4] which rely on the judicial forum as an essential feature of the Act. Saari bases his argument on the enforcement provision of the EPPA which prohibits a waiver of both the rights and procedures available under the EPPA. As stated *supra* in section I.A., this argument lacks merit.

Saari further argues that if he is compelled to arbitration, the panel of arbitrators would be drawn from the securities industry, which would be inimical to the underlying purposes of the EPPA. This argument is without merit. "[M]istrust of the arbitral process" was clearly rejected as a reason for avoiding arbitration by the Court in *Gilmer*. *Gilmer*, 111 S. Ct. at 1656, n.5.

We conclude that Saari's claims under EPPA were subject to arbitration, and therefore the district court erred in denying Smith Barney's motion to compel arbitration and to stay the case pending arbitration.

## II.

## *SCOPE OF RULE 347 AND SAARI'S U-4 FORM*

Saari argues that none of his claims are arbitrable because they do not "arise out of" his employment as a registered representative, and therefore are not within the scope of N.Y.S.E. Rule 347, as incorporated in his U-4 form. Saari contends that his claims do not implicate any customers, the handling of their accounts, or his performance as a broker. Relying on decisions from

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[4] Saari contends that the underlying purposes of the EPPA are to protect employees from the employer's superior economic power and its ability to circumvent statutory prohibitions on the use of polygraph testing.

both the Eighth Circuit[5] and the Sixth Circuit,[6] Saari argues that a theft of customer property would be arbitrable, whereas a theft of employee property would not. He also argues that this dispute does not involve termination of employment within the scope of Rule 347, but discharge for an illegal purpose.

[9] The plain language of Rule 347 provides that "*any controversy* between a registered representative and any member or member organization *arising out of* the *employment or termination of employment* of such registered representative by and with such member or member organization *shall be settled by arbitration* . . . ." (emphasis added). Saari was admittedly discharged from employment. He claims his discharge was in violation of EPPA, which is disputed by Smith Barney. Saari's argument that the controversy did not arise out of the termination of this employment is without merit.

## III.

## *STATE LAW CLAIMS*

### *A. California Labor Code Section 432.2*

Saari argues that his state polygraph claim is not arbitrable because Congress, by exempting federal polygraph claims from arbitration, also intended to exempt state polygraph claims. This argument has no merit. As pointed out above, there is no exemption of federal polygraph claims.

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[5] *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984).

[6] *Aspero v. Shearson American Express, Inc.*, 768 F.2d 106 (6th Cir.), *cert. denied*, 474 U.S. 1026 (1985).

Saari also relies on the non-preemption provisions of EPPA in Section 2009 which provide: "this chapter shall not preempt any provision of any State or local law . . . that prohibits lie detector tests or is more restrictive with respect to lie detector tests than any provision of this chapter." Saari contends that Section 2009 saves his state law claims from arbitration because the California law is only more restrictive than EPPA if its judicial enforcement remains intact.

**[10]** Section 2009 merely protects state statutory remedies which are more protective of the employee than EPPA. It does not, however, determine whether the state law claim should be arbitrated or adjudicated in the federal district court. To the extent that California's preference for a judicial forum would interfere with the choice expressed by Congress in the FAA, it is preempted. *See Perry v. Thomas*, 482 U.S. 483, 491 (1987) (state statute providing a judicial forum for wage/commission claim based on the sales of securities which is in conflict with the FAA must give way).

**B.** ***The Slander Claim***

Saari asserts that his slander claim is not subject to arbitration because, based on *Morgan*, the connection between the dispute over whether Saari stole money from a fellow worker's desk and his employment is too tenuous, and, therefore, did not "arise out of his employment or termination of employment" within the scope of Rule 347.

**[11]** In *Zolezzi*, the alleged defamatory statements related directly to Zolezzi's handling of customer accounts while employed by Dean Witter, and this court held the defamation claim to be arbitrable. *Zolezzi*, 789 F.2d at 1450-51. In *Morgan*, the alleged slanderous remarks were "that Smith Barney personnel told

Morgan's fellow office workers that he stole things from their desks at night." *Morgan*, 729 F.2d at 1168. The Eighth Circuit found the connection between this dispute and Morgan's employment to be tenuous, and held the claim outside the scope of Rule 347. *Id.* In the present case, however, Saari alleged that "a sum of money, *supposedly belonging to a client of Smith Barney*, was supposedly stolen from the desk of a Smith Barney employee." The claim that a *client's* money was stolen from an employee's desk implicates Saari's job as a broker. In regards to arbitration, *Zolezzi* and *Morgan* appear to differentiate between stealing a client's money and stealing the employer's money. We neither accept nor reject the decision in *Morgan*, leaving that case for another day.

## *CONCLUSION*

The Supreme Court, most recently in *Gilmer*, has repeatedly told us that the Federal Arbitration Act manifests a liberal policy favoring arbitration agreements. The distinctions Saari advances between EPPA and ADEA are not convincing. Congress has not evidenced any intention that EPPA claims not be arbitrable if a proper contractual base is found. The state law claims are also subject to arbitration and the district court was in error in denying Smith Barney's motions.

VACATED AND REMANDED, COSTS TO APPELLANT.

# APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
DEC 12 1989
Clerk, U.S. District Court
Central District of California
By _____ Deputy

HOWARD E. SAARI,
Plaintiff,
v.
SMITH BARNEY, HARRIS, UPHAM & CO.,
Defendant.

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CASE NO.: CV-89-1870 MRP

MEMORANDUM OF DECISION

This Court heard oral argument on defendant Smith Barney, Harris, Upham & Co's motion to compel arbitration and stay proceedings pending arbitration on October 23, 1989. Having read the papers submitted and considered the arguments of the parties, the Court denies defendant's motion as to the first and second claims for relief, and stays defendant's motion as to the third claim for relief pending further factual determination.

## I. Facts

Plaintiff Howard Saari ("Saari") was employed by Smith Barney, Harris, Upham & Co. ("Smith Barney") as an Account Executive as of July 7, 1988. As a condition of employment, plaintiff signed a Uniform

Application for Securities Industry Registration ("U-4 form") which specifically provided in relevant part:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . . .

As a registered representative of the New York Stock Exchange, plaintiff is subject to Rule 347 of the NYSE, which provides that:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration . . . .

The complaint alleges that plaintiff was questioned in December 1988 regarding an alleged theft of a sum of money from another Smith Barney employee. In February 1989, plaintiff claims that he was told by his manager that Smith Barney wanted him to take a polygraph test in connection with the theft. When plaintiff refused, according to him, he was terminated.

Plaintiff then filed this suit alleging a violation of the Employee Polygraph Protection Act of 1988 ("EPPA"), 29 U.S.C. § 2001 *et seq.*, and two pendent state claims: tortious wrongful termination in violation of Cal. Labor Code § 432.2 ("Polygraph or lie detector test as condition of employment"), and slander. Defendant brought this motion to compel arbitration and stay proceedings pending arbitration of all three claims, pursuant to the Federal Arbitration Act, 9 U.S.C. § 3.

## II. Discussion

Plaintiff does not deny that he signed the U-4 form, nor that as a registered stockbroker he is bound by Rule 347. Rather, plaintiff bases his opposition to the motion on the ground that Congress did not intend that controversies arising under the EPPA be arbitrated. Plaintiff also opposes the arbitration of the state polygraph protection claim on the ground that the EPPA contemplated the use of state laws to achieve its goals. Plaintiff did not present any opposition to the arbitrability of the state claim for slander, but indicated at oral argument that he would oppose arbitration of this claim as well.

### A. Arbitrability of Claims under the EPPA

It should be noted at the outset that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2 *et seq.*:

> [E]stablished a "federal policy favoring arbitration," requiring that "we rigorously enforce agreements to arbitrate." This duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights.

*Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (cites omitted). Nevertheless, the *Shearson* Court went on to explain that:

> Like any statutory directive, the Arbitration Act's mandate may be overriden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or preclude waiver of a judicial forum for the

> particular claim, such an intent "will be deducible from [the statute's] text or legislative history," or from an inherent conflict between arbitration and the statute's underlying purposes.

482 U.S. at 226-27 (cites omitted).

Plaintiff contends that Congress had manifested its intention that claims under the EPPA not be arbitrated in two ways: 1) the design of the enforcement scheme, which contemplates a judicial forum, and 2) the provision that disallows waiver of substantive rights and procedures guaranteed by the EPPA.

### 1. Conflict between Arbitration and Purposes of EPPA

The Supreme Court has identified certain statutes dealing with individual/employee rights as ones under which the aggrieved employee may not be estopped from pursuing judicial review of his or her grievance, even where the employee had previously unsuccessfully arbitrated it. *See McDonald v. West Branch*, 466 U.S. 284 (1984) (Section 1983); *Barrentine v. Arkansas-Best Freight Systems*, 450 U.S. 728 (1981) (Fair Labor Standards Act); *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) (Title VII).[1] In such cases, the Court held that the "purposes and procedures" of the statute in question "indicate that Congress intended federal courts to exercise final responsibility for enforcement of [the statute]," and that to defer to arbitral decision "would be

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[1] Although in this case the plaintiff has not previously submitted his grievance to arbitration, as in the three Supreme Court cases cited, the issue whether arbitration is the exclusive forum for the claim is the same. Therefore, the holdings and reasoning in those cases are controlling in this case as well.

inconsistent with that goal." *Alexander*, 415 U.S. at 56. As the Court in *Barrentine* stated:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.[2]

450 U.S. at 737.

In *Nicholson v. CPC Int'l Co.*, 877 F.2d 221 (3d Cir. 1989), the Third Circuit decided that Congress likewise did not intend that the right to a judicial forum under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, could be displaced by arbitration. There were three important considerations in the enforcement scheme devised in the ADEA which led to the *Nicholson* court's conclusion that "the ADEA is one of the statutory schemes that present the 'inherent conflict [with] arbitration' referred to by the Supreme Court in *Shearson*," 877 F.2d at 227. First, the court noted that compliance with the ADEA is overseen by a public

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[2] In another case approving both *Alexander* and *Barrentine* in the context of an individual employment contract, the Eighth Circuit noted that: "Although *Alexander* involves a collective bargaining agreement, and not a commercial arbitration agreement under the FAA, this fact should not change the Court's analysis. The *Alexander* Court was well aware that federal policy favors arbitration. That decision turned not on the fact that a collective bargaining agreement was involved, but instead on the unique nature of Title VII." *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1306 (8th Cir. 1988).

agency, the EEOC.[3] Under the ADEA, the EEOC may investigate violations, promulgate regulations, keep records, advise employers and other organizations of their duties under the Act; furthermore, the filing of a charge with the EEOC by the aggrieved employee is a prerequisite to a court action. *Id.* Moreover, the EEOC, unlike the SEC in the Securities Act, has no power to affect the arbitration procedure in which claims under the statute in question would be decided. *Id.* at 228.

Second, the *Nicholson* court noted the inadequacy of arbitration to enforce the ADEA effectively, given the inability of arbitrators to award broad equitable relief, such as injunctions to bar employers from future acts of discrimination. *Id.* The ADEA contemplates extensive use of injunctive relief. 29 U.S.C. § 626(b).

Third, the court recognized Congress' intent to ensure judicial review of claims under the ADEA through the "provision authorizing maintenance of a collective suit, *i.e.*, a suit 'by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.' " 877 F.2d at 229 (quoting from 29 U.S.C. § 216(b)). Finally, the court stated that although the Supreme Court cases evinced some mistrust of arbitration as a remedy, the holding of these cases was based as well on an analysis of the provisions, objectives, and enforcement schemes of the statutes. 877 F.2d at 229.

With these factors in mind, the Court turns to an analysis of the EPPA. First of all, the legislative history of the EPPA clearly shows that the Act was designed to provide minimum substantive guarantees for individual workers. The Senate Report states the the purpose behind the EPPA was "to eliminate the denial of employ-

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[3] Initially, enforcement of the ADEA was entrusted to the Secretary of Labor. *Nicholson*, 877 F.2d at 225.

ment opportunities by prohibiting the least accurate yet more widely used lie-detector tests, preemployment and random examinations, and providing standards for and safeguards from abuse during tests not prohibited." S. Rep. No. 284, 100th Cong., 2d Sess. 39, *reprinted in* 1988 U.S. Code Cong. & Admin. News 726.

In addition, the EPPA has substantially the same enforcement scheme as the ADEA. Sections 2004 and 2005(b) of the EPPA give the Secretary of Labor the same authority as is provided the EEOC under the ADEA, except that filing a charge with the Secretary is not a prerequisite for a court action. And like the EEOC, the Secretary has no power under the statute to affect the arbitration procedure. Second, §§ 2005(b) and (c)(1) specifically provide for the extensive use of injunctions in enforcing compliance with the Act. Third, § 2005 (c)(2) provides for the maintenance of a collective action: "An action . . . may be maintained against the employer . . . by an employee or prospective employee for or on behalf of such employee, prospective employee, and other employees or prospective employees similarly situated."

Thus, the underlying purposes of the EPPA to ensure that substantive employment opportunities are granted to employees, as evidenced by its enforcement scheme, demonstrate a congressional intent that access to a judicial forum not be precluded by arbitration.

### 2. The Non-Waiver Provision

Additionally, plaintiff argues the Congress has expressed its intent that claims arising under the EPPA not be exclusively arbitrable by its inclusion of an "anti-waiver" provision, which provides in relevant part that "[t]he rights *and procedures* provided by this chapter

may not be waived by contract or otherwise." 29 U.S.C. § 2005(d) (emphasis added).

In a number of recent cases, the Supreme Court has held that certain anti-waiver provisions do not evidence an intent that claims under the statute in question be given access to a judicial forum. In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987), the Court held that a provision in the Securities Exchange Act of 1934 that declares void "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the Act]," did not forbid waiver of the provision of the Act that granted district courts the exclusive jurisdiction of all suits brought under the Act. Thus, the Court interpreted this anti-waiver provision so as not to preclude arbitration. *See also Rodriguez de Ouijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917 (1989) (Anti-waiver provision in Securities Exchange Act of 1933 did not preclude arbitration, overruling *Wilko v. Swan*, 346 U.S. 427 1953)).

While the anti-waiver provision in *McMahon* forbade waiver of compliance with *any* provision of the statute, the Court held that that provision "only prohibits waiver of the substantive obligations imposed by the Exchange Act," not of any jurisdictional provision, since it prohibited waiver of *compliance* with the Act. 482 U.S. at 228. By contrast, the anti-waiver provision in the EPPA specifically forbids waiver of any "rights and procedures" provided by the Act. None of the other cases involving an anti-waiver provision include any mention of the "procedures" of the Act. Thus, although the Act does not specifically provide, nor the legislative history state in so many words, that access to a judicial forum cannot be waived by a pre-dispute arbitration agreement, the Court agrees with plaintiff that the

wording of this anti-waiver provision provides additional evidence that Congress so intended.

### B. Arbitrability of State Polygraph Protection Claim

Smith Barney also argues that even if this Court denies its motion to compel arbitration of the EPPA claim, it must compel arbitration of pendent arbitrable claims, and Smith Barney argues that the state law claims here pled are arbitrable.

The Supreme Court in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985), held that the Federal Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims even where they retain jurisdiction of nonarbitrable claims.

However, in *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), the Eighth Circuit held that a pendent state anti-discrimination claim would not be compelled to arbitration, where the Title VII claim was held under *Alexander* to be judicially reviewable. It reached this conclusion based on the intention of Congress that state laws play an important role in enforcing the Title VII scheme, evidenced by the provisions that defer to state laws on employment discrimination and by the legislative history. *Id.* at 1308-09. *See also Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 476 (1982) ("It is sufficiently clear that Congress, both in 1964 and 1972, though wary of assuming the adequacy of state employment discrimination remedies, did not intend to supplant such laws.")

The *Swenson* court noted in a footnote, however, that a New Jersey district court had reached a contrary result in a case involving a state law ADEA claim, and held that under *Dean Witter Reynolds v. Byrd, supra*, the

court must compel arbitration of the state ADEA claim. The *Swenson* court, justifying its own conclusion, distinguished the ADEA from Title VII by arguing that:

> [T]here are many substantive and procedural differences in the provisions of Title VII and the ADEA. Title VII makes clear state procedures must be invoked as a prerequisite to a filing of a Title VII claim. The ADEA does not have a similar requirement. Under the ADEA, . . . it is provided that "upon commencement of action under this chapter such action shall supersede any State action" whereas Title VII contains no such limitation.

858 F.2d at 1309 n.12.

The EPPA fits neither extreme. Unlike Title VII, there is no provision in the EPPA that state procedures must be invoked before filing a federal claim. However, unlike the ADEA, there is no provision in the EPPA calling for superseding a state action once a federal one has begun. Additionally, there is some evidence both in the text of the statute and in the legislative history that Congress intended that state laws play a role in carrying out the purposes of the Act, *i.e.*, protection against unfair use of polygraph tests. Section 2009 of the Act provides that "this chapter shall not preempt any provision of any State or local law . . . that prohibits lie detector tests than any provision of this chapter." The House Report on the Act states that "State prohibitions on the use of polygraphs in private employment could preempt the limited exemptions provided in this Act." Furthermore, this Court notes that the New Jersey case cited in *Swenson, Steck v. Smith Barney, Harris Upham & Co.*, 661 F. Supp. 543 (D.N.J. 1987), did not directly address the question whether Congress' intent to preclude arbitration of claims under the ADEA extended to state law age discrimination statutes, but rather based

its decision purely on a strict reading of *Dean Witter. Id.* at 547-48. Therefore, the decision in *Steck* does not suggest a contrary result. This Court finds that the important role assigned to state law in carrying out the purposes of the EPPA would indicate that Congress intended to exempt state polygraph protection law claims from arbitration as well.

### C. Arbitrability of State Slander Claim

Saari has also alleged a state law claim for slander. The allegations to support this claim are that Smith Barney has "caused verbal statements to be published" that accuse plaintiff of the theft of money, which statements were untrue; and that Saari has had to "self-publish these accusations in order to truthfully answer questions from prospective employers who inquired about the stated grounds for termination."

It is clear that tort claims are within the scope of arbitration agreements, absent and express exclusion of such claims. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406-07 (1967). In order to determine whether an intentional tort is arbitrable or not where a stockbroker has agreed to arbitrate conflicts in accordance with the NYSE Rules and U-4 arbitration agreement, a court must first determine whether the tort "arises out of employment." In *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447 (9th Cir. 1986), the court held that allegedly defamatory statements that occurred after plaintiff's termination, relating to plaintiff's work performance and character as a stock broker, did arise out of the plaintiff's employment, and thus were arbitrable under the signed agreement. In so ruling, the court relied on the holding of *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984). In

*Morgan*, the court held that the first three counts of plaintiff's complaint were arbitrable since they "implicate his former customers, and [since] the statements [allegedly defamatory] concern the status of his broker's license and his handling of customer accounts," even though the statements all occurred after plaintiff's resignation. *Id.* at 1167-68. However, the court also held that count four was not arbitrable, as it concerned allegations that the employer told plaintiff's fellow employees that plaintiff had stolen things from their desks. The court held that "the connection between this dispute and Morgan's employment is tenuous. No customers or securities agencies are implicated, and no significant issue of Morgan's job performance *qua* broker is implicated." *Id.* at 1168. The court indicated, however, that there might be a different result if the theft had involved stealing customer "leads" from other brokers. *Id.*

In this case, the statements allegedly slanderous concerned precisely the same sort of conduct held in *Morgan* not to arise out of employment, that is, theft from another employees' desk. However, there is a factual issue as to whether the money allegedly stolen belonged to a client of Smith Barney. The complaint states that "a sum of money, supposedly belonging to a client of Smith Barney, was supposedly stolen from the desk of a Smith Barney employee." ¶ 6. Neither party addressed this issue in any of their moving or responsive papers. Therefore, the Court wishes to discuss with the parties the factual issue of whether or not the statements allegedly slanderous "arose out of employment." If they did, they are arbitrable.

THEREFORE, IT IS HEREBY ORDERED that defendant's motion to compel arbitration and stay proceedings be denied as to plaintiff's first and second claims for relief, and that the parties appear at a status

conference on December 18, 1989 at 10:00 a.m. to discuss with the Court the issue of whether defendant's motion should be granted as to the third claim for relief for slander.

DATED December 12, 1989

/s/ Marian Pfaelzer
Mariana Pfaelzer
United States District Judge

# APPENDIX C

GREENE, BRIOLLET, PAUL
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FILED
JAN 5 1990
Clerk, U.S. District Court
Central District of California
By _____ Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HOWARD E. SARRI,
Plaintiff,
vs.
SMITH BARNEY, HARRIS, UPHAM & CO., INC.,
Defendants.

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CASE NO.: CV-89-1870 MRP(Bx)

ORDER

The Motion of defendant Smith Barney, Harris, Upham, & Co. for an Order Compelling Arbitration and Stay Proceedings Pending Arbitration came on regularly for hearing on October 23, 1989. Further oral argument

concerning the arbitrablity [*sic*] for Plaintiff's Third Claim for Relief for Slander was had on December 18, 1989. Appearing as attorneys were Robert M. Tessier for plaintiff Howard Sarri, and Geraldine R. Darrow for defendant Smith Barney, Harris, Upham & Co.

Having read and considered all papers filed, and all oral argument in this matter, and having already decided the issue surrounding plaintiff's first and second claims for relief, IT IS HEREBY ORDERED That Defendant's Motion To Compel Arbitration And Stay Proceeding Be Denied As To Plaintiff's Third Claim For Relief For Slander.

Dated: January 5, 1990

/s/ Marian Pfaelzer
Mariana Pfaelzer
United States District Judge

hsl/pldgs

# APPENDIX D

# FEDERAL EMPLOYEE POLYGRAPH PROTECTION ACT

## § 2002. Prohibitions on lie detector use

Except as provided in sections 7 and 8 [29 USCS §§ 2006, 2007], it shall be unlawful for any employer engaged in or affecting commerce or in the production of goods for commerce —

(1) directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test;

(2) to use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee;

(3) to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against —

(A) any employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test, or

(B) any employee or prospective employee on the basis of the results of any lie detector test; or

(4) to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against, any employee or prospective employee because —

(A) such employee or prospective employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act [29 USCS §§ 2001 et seq.],

(B) such employee or prospective employee has testified or is about to testify in any such proceeding, or

(C) of the exercise by such employee or prospective employee, on behalf of such employee or another person, of any right afforded by this Act [29 USCS §§ 2001 et seq.]

**§ 2005. Enforcement provisions**

(a) **Civil penalties.** (1) In general. Subject to paragraph (2), any employer who violates any provision of this Act [29 USCS §§ 2001 et seq.] may be assessed a civil penalty of not more than $10,000.00.

(2) Determination of amount. In determining the amount of any penalty under paragraph (1), the Secretary shall take into account the previous record of the person in terms of compliance with Act [29 USCS §§ 2001 et seq.] and the gravity of the violation.

(3) Collection. Any civil penalty assessed under this subsection shall be collected in the same manner as is required by subsections (b) through (e) of section 503 of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1853) with respect to civil penalties assessed under subsection (a) of such section.

(b) **Injunctive actions by the Secretary.** The Secretary may bring an action under this section to restrain violations of this Act [29 USCS §§ 2001 et seq.]. In any action brought under this section, the district courts of the United States shall have jurisdiction, for cause shown, to issue temporary or permanent restraining orders and injunctions to require compliance with this Act [29 USCS §§ 2001 et seq.], including such legal or equitable relief incident thereto as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits.

(c) **Private civil actions.** (1) Liability. An employer who violates this Act [29 USCS §§ 2001 et seq.] shall be liable to the employee or prospective employee affected by such violation. Such employer shall be liable for such legal or equitable

relief as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits.

(2) Court. An action to recover the liability prescribed in paragraph (1) may be maintained against the employer in any Federal or State court of competent jurisdiction by an employee or prospective employee for or on behalf of such employee, prospective, employee, and other employees or prospective employees similarly situated. No such action may be commenced more than 3 years after the date of the alleged violation.

(3) Costs. The court, in its discretion, may allow the prevailing party (other than the United States) reasonable costs, including attorney's fees.

(d) **Waiver of rights prohibited.** The rights and procedures provided by this Act [29 USCS §§ 2001 et seq.] may not be waived by contract or otherwise, unless such waiver is part of a written settlement agreed to an signed by the parties to the pending action or complaint under this Act [29 USCS §§ 2001 et seq.].

**§ 2009. Effect on other law and agreements**

Except as provided in subsections (a), (b), and (c) of section 7 [29 USCS § 2006(a)-(c)], this Act [29 USCS §§ 2001 et seq.] shall not preempt any provision of any State or local law or any negotiated collective bargaining agreement that prohibits lie detector tests or is more restrictive with respect to lie detector tests than any provision of this Act [29 USCS §§ 2001 et seq.].

# FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT

## § 623. Prohibition of age discrimination

(a) **Employer practices.** It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as any employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

## § 626. Recordkeeping, investigation, and enforcement

(c) **Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial.** (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

# CALIFORNIA LABOR CODE

## § 432.2. Polygraph or lie detector test as condition of employment; advice of rights

(a) No employer shall demand or require any applicant for employment or prospective employment or any employee to submit to or take a polygraph, lie detector or similar test or examination as a condition of employment or continued employment. The prohibition of this section does not apply to the federal government or any agency thereof or the state government or any agency or local subdivision thereof, including, but not limited to, counties, cities and counties, cities, districts, authorities, and agencies.

(b) No employer shall request any person to take such a test, or administer such a test, without first advising the person in writing at the time of the test is to be administered of the rights guaranteed by this section.

# NEW YORK STOCK EXCHANGE RULES

## ¶ 2347 Controversies As to Employment or Termination of Employment

**Rule 347.** Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

92-550

Supreme Court, U.S.
FILED
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No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1992

HOWARD E. SAARI,
*Petitioner,*

vs.

SMITH BARNEY, HARRIS UPHAM & CO., INC.,
*Respondent.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No.

# In the Supreme Court

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OCTOBER TERM, 1992

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HOWARD E. SAARI,
*Petitioner,*

VS.

SMITH BARNEY, HARRIS UPHAM & CO., INC.,
*Respondent.*

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### I.

### INTRODUCTORY STATEMENT

This brief in opposition to petition for writ of certiorari is filed on behalf of SMITH BARNEY, HARRIS UPHAM & CO. INCORPORATED ("Smith Barney"), defendant in the district court and appellant in the Ninth Circuit proceedings. It is filed in opposition to the petition filed by HOWARD E. SAARI ("Saari"), plaintiff in the district court and appellee in the Ninth Circuit proceedings.

Saari's petition seeks review of the arbitrability of a federal statute, an issue most recently resolved against Saari in this Court's decision entitled *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. ____, 114 L.Ed. 2d 26, 111 S. Ct. 1647 (1991).

While Saari seeks to distinguish this Court's decision in *Gilmer* because a separate piece of federal legislation is involved, the Employer Polygraph Protection Act ("EPPA") rather than the Age Discrimination and Employment Act ("ADEA"), the Ninth Circuit Court of Appeals properly found the polygraph statute to be equally arbitrable based upon this Court's directives in *Gilmer*.

There is neither need nor basis for this Court's review of the Ninth Circuit's decision below. There is neither conflict between the circuits nor an unsettled area of the law to resolve. The continuous line of decisions from this Court extolling the virtues of arbitration as applied to various and diverse federal legislation contradicts Saari's assertion that the issue is entitled to review.

Even if considered on its merits, Saari's petition would be denied. His central premise confuses the issue of voluntary submission to a polygraph test with voluntary submission to an agreement to arbitrate. Whatever substantive rights Saari may possess with regard to the purportedly coercive use of polygraph examinations, those rights can be fully discharged in arbitration.

## II.

## STATEMENT OF THE CASE

Saari's statement of the case, as appears at pages two through four of his petition, is essentially correct. Pursuant to an arbitration clause contained within a Uniform Application for Securities Industry Registration ("U-4 Form"), together with Rule 347 of the Rules of the New York Stock Exchange, Smith Barney moved to compel arbitration of Saari's various federal and state claims.[1]

The original motion, filed prior to *Gilmer*, was denied by the trial court. Prior to appellate briefing, this Court rendered its decision in *Gilmer*, causing the Ninth Circuit to reverse the trial court's order and compel arbitration of all of Saari's claims.

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[1]Both the U-4 Form and Rule 347 were before this Court in *Gilmer*.

While Smith Barney denies that there is any basis for granting this petition, it does not contest Saari's assertion of jurisdiction at any step of the proceedings.

## III.

## ARGUMENT

### A. THE PETITION SHOULD BE DENIED AS SAARI HAS FAILED TO DEMONSTRATE ANY BASIS FOR REVIEW IN THIS COURT.

This Court has consistently rendered a continuing line of decisions confirming the arbitrability of specific federal legislation: *Gilmer* [ADEA]; *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 96 L.Ed. 2d 185, 107 S. Ct. 2332 (1987) [Securities Exchange Act of 1934]; *Rodriguez de Quijas v. Shearson/American Express Inc.,* 490 U.S. 477, 104 L.Ed. 2d 526, 109 S. Ct. 1917 (1989) [Securities Act of 1933]. Additionally, other recent decisions of this Court confirm the virtues of arbitration as a dispute resolution process. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 74 L.Ed. 2d 765, 103 S. Ct. 927 (1983); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.,* 473 U.S. 614, 87 L.Ed. 2d 444, 105 S. Ct. 3346 (1985).

Following *Gilmer,* which resolved a conflict between the Fourth and Third Circuits concerning the arbitrability of claims under the ADEA, various circuit and district courts have uniformly applied the teaching of *Gilmer:* Claims under various forms of federal legislation are properly subject to arbitration. These include the following: *Alford v. Dean Witter Reynolds Inc.,* 939 F.2d 229 (5th Cir. 1991) [Title VII]; *Willis v. Dean Witter Reynolds, Inc.,* 948 F.2d 305 (6th Cir. 1991) [Title VII and state sexual discrimination statute]; *Bierdeman v. Shearson Lehman Hutton Inc.,* 1992 U.S. App. Lexis 13271, Lexis p. 2 (9th Cir. May 28, 1992) [Title VII]; *Mago v. Shearson Lehman Hutton Inc.,* 956 F.2d 932 (9th Cir. 1992) [Title VII]; *Bender v. A. G. Edwards & Sons Inc.,* 971 F.2d 698 (11th Cir. 1992) [Title VII]; *Sacks v. Richardson Greenshields Securities Inc.,* 781 F. Supp.

1475 (E.D. Cal. 1991) [gender discrimination under California's Fair Employment and Housing Act]; *Kaliden v. Shearson Lehman Hutton Inc.*, 789 F. Supp. 179 (W.D. Pa. 1991) [ADEA and State Human Relations Act]; *Boogher v. Stifel, Nicholaus & Co.*, 764 F. Supp. 574 (E.D. Mo. 1991) [ADEA]; *Bender v. Smith Barney, Harris Upham & Co. Inc.*, 789 F. Supp. 155 (D.E.N.J. 1992) [Title VII]; *Gardner v. Benefits Communications Corp.*, 1991 U.S. Dist. Lexis 18367, Lexis p. 2 (D.D.C. Dec. 31, 1991) [D.C. Human Rights Act]; *King v. The First Boston Corp.*, 1992 U.S. Dist. Lexis 4745, Lexis pg. 2 (S.D.N.Y. Apr. 13, 1992) [Title VII]; *Scott v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1992 U.S. Dist. Lexis 13749, Lexis pp. 11-12 (S.D.N.Y. Sept. 14, 1992) [Title VII]; *Foley v. Presbyterian Ministers Fund*, 1992 U.S. Dist. Lexis 3572, Lexis pp. 5-6 (E.D. Pa. Mar. 20, 1992) [ADEA]; and *Friedman v. Hamilton Investments Inc.*, 1992 U.S. Dist. Lexis 8258, Lexis p. 6 (N.D. Ill., Eastern Div., Jun. 9, 1992) [ADEA].

The appellate history in *Alford v. Dean Witter Reynolds Inc., supra*, is perhaps most instructive in demonstrating why Saari's petition should be denied. In the original Fifth Circuit opinion, 905 F.2d 104 (5th Cir. 1990), the Court of Appeals refused to compel arbitration. This Court then granted certiorari, vacating the Fifth Circuit's opinion and remanding the matter to the Fifth Circuit in light of this Court's decision in *Gilmer*. In a subsequent opinion, 939 F.2d 229 (5th Cir. 1991), the Fifth Circuit reversed its earlier decision and compelled arbitration of all claims.

The more recent Sixth Circuit decision in *Willis v. Dean Witter Reynolds, Inc., supra*, further illustrates the absence of any present need for Supreme Court involvement. When faced with a claim under Title VII and the Kentucky state sexual discrimination statute, the Court of Appeals compelled arbitration of Willis' claims, specifically noting the following:

> ... We find *Gilmer* to be dispositive of every argument presented by the plaintiff and the EEOC in this appeal.

(948 F.2d at 307.)

In *Alford*, the plaintiff attempted to distinguish the *Gilmer* decision by asserting that the claim involved Title VII rather than

the ADEA. In granting certiorari to vacate the appellate court's original decision refusing to compel arbitration and mandating for further proceedings in light of *Gilmer,* this Court specifically found Alford's distinction to be meaningless. The message from *Gilmer* is clear and not nearly so limited as Saari's petition would suggest. Claims arising under various federal statutes, including the ADEA, Title VII, the EPPA and others, are properly compelled to arbitration pursuant to a validly executed U-4 Form.

Accordingly, Saari has demonstrated no basis for obtaining review in this Court. The Ninth Circuit's opinion properly corresponds with this Court's directives in *Gilmer* and is accord with all circuit courts which have rendered decisions following *Gilmer.*

## B. THE PETITION SHOULD BE DENIED AS SAARI HAS FAILED TO DEMONSTRATE A BASIS FOR DISTINGUISHING CLAIMS UNDER THE EPPA.

Saari attempts to argue that differences in wording between the EPPA and the ADEA require that the *Gilmer* decision be discarded in considering the arbitrability of Saari's claim.[2] Essentially, Saari argues that because the EPPA anti-waiver provision provides that the "rights and procedures" provided by this chapter may not be waived by contract or otherwise, 29 U.S.C. § 2005(d), arbitration cannot be compelled.

The Ninth Circuit expressly rejected Saari's argument, advising that Saari's argument could not stand in light of *Gilmer.* (Appendix A, at 9.) The Ninth Circuit stressed that in *Gilmer* this Court

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[2]In briefing this issue at the district court level prior to the *Gilmer* decision, Saari made no such attempts to differentiate between the ADEA and the EPPA. To the contrary, because of then existing precedent such as *Nicholson v. CPC International Inc.,* 877 F.2d 221 (3rd Cir. 1981), Saari argued that similar results should obtain under both Acts, specifically advising the trial court that "a comparison of the ADEA and the EPPA reveals that the enforcement schemes are virtually the same and, thus, the same reasons that compelled the *Nicholson* court to conclude that arbitration is incompatible with the ADEA also compelled the conclusion that arbitration is incompatible with the EPPA." (CR 10, P. 9, LL. 12-18.)

noted that the substantive rights enforced by arbitration are identical to those enforced in a judicial forum, the only difference being an agreement by the parties to submit the "resolution in an arbitrable, rather than a judicial, forum. *Gilmer*, 111 S. Ct. at 1652." (Appendix A, at 9.)

The Ninth Circuit then went on to note that the term "procedures" is simply too broad to relate solely to forum selection. For an employer to utilize the provisions relating to ongoing investigations under Section 2006(d), it would be required to follow certain "procedures." The type of protective procedures found in Section 2006(d) (where polygraphs *may* be required under the Act) are the "rights and procedures" properly subject to the anti-waiver clause. (Appendix A, at 9-10.)

Finally, the Ninth Circuit emphasized that the "and procedures" language in the EPPA is no stronger than the anti-waiver provisions found in the Sherman Act, the Securities Exchange Act of 1934, the Securities Act of 1933 and RICO. Despite language in each of those Acts precluding waiver, this Court has specifically held that arbitration should be compelled in each context. (Appendix A, at 10.)

## C. THE PETITION SHOULD BE DENIED AS SAARI'S CENTRAL PREMISE FAILS TO DIFFERENTIATE BETWEEN VOLUNTARY SUBMISSION TO A POLYGRAPH EXAMINATION AND VOLUNTARY EXECUTION OF AN ARBITRATION PROVISION.

Even if Saari could demonstrate a basis for Supreme Court review, his theory of relief is unsupportable. A fatal flaw in his petition is his failure to distinguish between the substantive rights under the EPPA (a prohibition against coerced or involuntary polygraph testing) and the resolution of which forum should properly resolve and discharge those rights. Specifically, Saari's petition asserts at page 9:

> If the intent of Congress was, as it clearly was, to prohibit the compelling of polygraph examinations as a condition of obtaining or keeping a job, then permitting an employer as a condition of employment to compel a potential employee to

> forego the judicial remedy and arbitrate a claim for violation of the Act is inherently inconsistent.

Saari's argument is both illogical and unsound. While Congress indeed intended to prohibit the compelling of polygraph examinations as a condition of obtaining or maintaining employment, that right can and is being properly protected and enforced in both the judicial and the arbitration forum. Saari's rights to seek relief under the Act are unaffected by whether or not he has executed an agreement with his employer which contains an arbitration clause.

## D. THE PETITION IS NOT SAVED BY SAARI'S INCLUSION OF VARIOUS STATE LAW THEORIES.

Finally, Saari argues that his California *Labor Code* claims cannot be compelled to arbitration because there is a limitation on federal preemption in the EPPA. (Petition, P. 10.) The Ninth Circuit quickly disposed of Saari's argument, noting that there is no exemption of federal polygraph claims. (Appendix at 12.) More specifically, with regard to the issue of preemption in general, the Ninth Circuit's opinion concluded as follows:

> Section 2009 merely protects state statutory remedies which are more protective of the employee than EPPA. It does not, however, determine whether the state law claim should be arbitrated or adjudicated in the federal district court. To the extent that California's preference for a judicial forum would interfere with the choice expressed by Congress and the FAA, it is preempted. *See Perry v. Thomas*, 482 U.S. 483, 491 (1987) (state statute providing a judicial forum for a wage/commission claim based on the sales of securities which is in conflict with the FAA must give way).

## IV.

## CONCLUSION

For the reasons stated, the petition should be denied in its entirety.

Dated: October 20, 1992

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